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No. 79-1761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

On Appeal From The North Carolina Supreme Court

REPLY TO OPPOSITION TO PETITION

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Pursuant to Rule 22 of the Rules of the Supreme Court, the Petitioner files this Supplemental and Reply Brief to apprise the Court of a recent case not decided at the time of the filing of the Petition, and to reply in part to new matters raised by the State in its Brief.

In *United States* v. *MacDonald,* _____ F.2d _____, (4th Cir., July 29, 1980)*, the Fourth Circuit Court of

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* Prior to trial, MacDonald took an interlocutory appeal and prevailed on the speedy trial issue, but this Court reversed and held that the matter was not ripe for review prior to trial. *United States* v. *MacDonald,* 531 F.2d 196 (4th. Cir. 1976), reversed on prematurity grounds, 435, U.S. 850 (1978).

Appeals reversed the triple murder conviction of defendant on Six Amendment grounds because of a pre-indictment delay of twenty-six months.

During this critical twenty-six month period, defendant MacDonald was not under arrest, indictment, or other formal charge, but the case was under investigation.

Such is the case of the petitioner, where there was a delay of over two (2) years prior to the indictment, but during which time the case was under investigation by various agencies of the State of North Carolina.

While defendant MacDonald had earlier been arrested, it is significant the arrest warrant had been dismissed early on, and the twenty-six month delay which the Court deemed crucial occurred *during this interval.* What is more significant is that the Court held:

> [t]he Six Amendment. . .secures. . .rights to a speedy trial *against oppressive conduct by the government in its single sovereign capacity,* regardless of the name of the manner and character of the executive departments that participate in the prosecution.

In the case at bar, petitioner was investigated continuously during the two year period by the Attorney General's Office of the State of North Carolina, the North Carolina State Bureau of Investigation, the Secretary of the State of North Carolina, and the District Attorney of North Carolina.

The importance of the unexcusable twenty-six (26) month delay in *United States* v. *MacDonald, supra,* and why the court declared it controlling, is that the delay contributed to the "anxiety and concern" of the defendant an interest which achieved constitutional

stature in this Court's opinion in *Barker* v. *Wingo,* 407 U.S. 514 (1972).

The Fourth Circuit has twice held that the pre-indictment delay in *United States* v. *MacDonald, supra,* required dismissal of the indictments. The petitioner suggests that the logic and decisions of the court in *United States* v. *MacDonald, supra,* should be followed by this Court.

It should be noted that the State's Brief in Opposition to the Petition for Writ of Certiorari states, at Page 16, that the petitioner may seek indictments for perjury against the district attorney regarding his testimony at the trial if he feels that the district attorney has been untruthful, and that Petitioner could employ private prosecution for such purpose.

Petitioner would point out that a defendant who is convicted, in part, on the allegedly perjured testimony of the district attorney ought not to have as his exclusive remedy a perjury indictment against the witness to correct the wrong. Such a response by the State represents the cavalier concern of the State for the petitioner's constitutional rights that permeates this entire record and should not be sanctioned by this Court.

N.C.G.S. 15A-626, to which the State makes reference, states that the district attorney provides that witnesses are to be called before the grand jury, and that *the district attorney, in his discretion, may call or refuse to call* any witness the foreman of the grand jury requests the district attorney to call as a witness pursuant to G.S. 15A-626(b).

Petitioner knows of no authority by which one could retain a private prosecutor *without* the district attorney's consent. Certainly, the State cites no cases in which a private prosecutor can submit witnesses to the grand jury.

A grand jury may make a written accusation on its own motion, a presentment, but a presentment by statute does not constitute a criminal proceeding, and it requires the district attorney to submit a bill of indictment to the grand jury only "when it is appropriate to do so." N.C.G.S. 15A-641. This obviously leaves the discretion of what is "appropriate" to the district attorney. This is contrary to the practice in many states in which the grand jury does not need the agreement of the district attorney to issue a presentment.

An information is a written accusation by a district attorney charging a person represented by counsel with a crime. G.S. 15A-644. The grand jury has no authority to issue an information.

Clearly, then, the remedy that the State suggests is not only an inadequate remedy, it is no remedy at all.

CONCLUSION

For these additional reasons, the Petition should be granted.

Respectfully submitted,

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